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SERVICE DATE – JANUARY 28, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 212X)

NORFOLK SOUTHERN RAILWAY COMPANY–DISCONTINUANCE
EXEMPTION–IN HUDSON COUNTY, NJ

STB Docket No. AB-55 (Sub-No. 584X)

CSX TRANSPORTATION, INC.–DISCONTINUANCE
EXEMPTION–IN HUDSON COUNTY, NJ¹

Decided: January 25, 2002

On November 14, 2000, Norfolk Southern Railway Company (NS) filed a petition for exemption² under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to discontinue service over two rail segments formerly owned by Consolidated Rail Corporation (Conrail).³ Specifically, NS sought to discontinue service over 3.84 track miles of the

¹ The proceedings are not consolidated; they are being considered together for administrative convenience.

² Notice was served and published at 65 FR 76003 on December 5, 2000.

³ Conrail filed applications to abandon its remaining interest in the line segments on November 14, 2000. See Conrail–Abandonment of the Weehawken Branch–In Hudson County, NJ, STB Docket No. AB-167 (Sub-No. 766N), and Conrail–Abandonment of the River Line–In Hudson County, NJ, STB Docket No. AB-167 (Sub-No. 1067N) (Conrail Abandonments). The applications were filed under section 308 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. 748 (3-R Act), a provision that was added by the Northeast Rail Service Act of 1981 (NERSA), enacted as Subtitle E of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35. NERSA established separate, expedited procedures for Conrail abandonments. Section 308(c) applies to lines for which Conrail filed a notice of insufficient revenue (NIR) prior to November 1, 1983. The NIR procedure was extended to November 1, 1985, by Pub. L. No. 98-181. Section 308 provides that abandonment shall be authorized within 90 days of filing an application unless an offer of financial assistance (OFA) is made to purchase, or subsidize operations over, the line within the 90-day period. Conrail filed NIRs for the lines at
(continued...)

Weehawken Branch,⁴ 6.95 track miles of the River Line,⁵ and related track, all in Hudson County, NJ. CSX Transportation, Inc. (CSXT), filed a virtually identical petition for exemption on November 20, 2000.⁶ As a result of changes made to track alignments and operations, the two segments are now operated as a single line measuring 6.23 route miles (excluding parallel and adjacent track) between North Bergen and Jersey City. NS Supplemental Reply at 11. For convenience the two lines will be referred to jointly as the River Line or the Line, and NS and CSXT will sometimes be referred to as Petitioners.

On December 28, 2000, Cognis Corporation (Cognis), one of two businesses that used rail service on the River Line within the past 2 years, filed a reply (Reply) in opposition to the petitions for exemption.⁷ Conrail, NS, and CSXT filed a joint reply on January 16, 2001 (Joint Reply). We issued a decision on March 13, 2001, directing NS and CSXT to file supplemental revenue, cost, and environmental information. They filed supplemental statements on May 4, 2001, and Cognis filed a supplemental reply on June 4, 2001. We are granting NS' and CSXT's petitions for exemption, subject to employee protective conditions.

³(...continued)
issue here on October 31, 1983, and October 31, 1985, respectively.

⁴ The 3.84-mile segment extends from the "point of switch in Jersey City[, NJ]" (approximately MP 0.00) "to the southerly R.O.W. [right-of-way] line of Baldwin Avenue in Weehawken[, NJ]" (approximately MP 2.84), and includes the former Delaware, Lackwanna & Western Railroad Lead to the Hoboken Freight Yard in Jersey City. NS Petition for Exemption at 3.

⁵ The 6.95-mile segment is composed of the parts of Conrail's River Line: (1) from the connection to the Passaic and Harismus Branch at Controller Point (CP) "Waldo" in Jersey City (approximately MP 0.00) to the south side of Clifton Road in Weehawken (approximately MP 4.7), including the River Yard; and (2) from the south side of Clifton Road in Weehawken (approximately MP 0.00) to the northwest side of Tonnelle Avenue (excluding the portion of line, associated track, and underlying right-of-way necessary to retain access and continue service to Durkee Foods) in North Bergen, NJ (approximately MP 1.53); plus the National Docks Secondary in Jersey City from where it connects with the River Line at CP "Nave," to the east side of Newark Avenue (approximately 1,350 feet); and the Weehawken Branch (Chicken Yard) in Weehawken, from where it connects with the River Line on the east side of Willow Avenue to the end of the track (approximately 2,450 feet).

⁶ Notice was served and published at 65 FR 77071 on December 8, 2000.

⁷ Dykes Lumber Company, Inc. (Dykes), the other business, filed a letter on January 18, 2001, that contained no evidence or argument but expressed support for Cognis.

BACKGROUND

The River Line is one of a number of branch lines located within the North Jersey Shared Assets Area (NJSAA), one of three Shared Assets Areas set up and approved as part of the acquisition of Conrail by NS and CSXT. See CSX Corp.–Control–Conrail Inc. et al., 3 S.T.B. 196, 226-28 (1998) (Conrail Purchase), clarified and modified 3 S.T.B. 764 (1998), aff'd sub nom. Erie Niagara Rail Steering Committee v. STB, 247 F.3d 437 (2d Cir. 2001).⁸ NS and CSXT acquired local and overhead operating rights over the River Line and all other lines within the three Shared Assets Areas. NS and CSXT have exclusive and independent authority to establish rates, charges, service terms, routes, and divisions for, and to collect freight revenues on, any traffic moving within the Shared Assets Areas for their account. See Conrail Purchase, 3 S.T.B. at 228. Neither carrier, however, has operated over the River Line. Instead, Conrail, acting as their agent, provided service to Cognis and Dykes.

Cognis' River Line facility is in Hoboken. The facility is used to process ethoxylated fatty alcohols (ETOHs), the primary raw material that is shipped to it, into about 230 finished products. The finished products are shipped to customers to be manufactured into a diverse array of products, including cosmetics, cleansers, paints, plastics, lubricants, and coatings. Tank trucks deliver virtually all of the ETOHs shipped to, and virtually all of the finished product shipped from, the Hoboken facility.

The Hoboken facility makes limited use of rail service primarily to receive tank car shipments of ETOHs that originate at another Cognis facility in Charlotte, NC. Rail service is used to even a lesser extent to ship tank cars of finished product to Jacksonville, FL.⁹

Conrail transferred a large part of the River Line's real estate and track to the New Jersey Transit Corporation (NJT), an instrumentality of the State of New Jersey, on or about October 24, 1995. Conrail retained the remaining real estate and track, as well as an exclusive and permanent easement to operate freight service over the transferred property. The transfer was made pursuant to the Freight Relocation and River Line Acquisition Agreement (Agreement) that was entered into on August 2, 1985, and formalized on June 8, 1989. Under the Agreement,

⁸ NS and CSXT divided most of Conrail's assets between themselves, with the old New York Central Lines going to CSXT and the old Pennsylvania Railroad Lines going to NS. Petitioners acquired a few of Conrail's lines jointly (i.e., the Shared Assets Areas), and Conrail was retained in existence to operate these lines for them.

⁹ Cognis made no outbound rail shipments in 2000 and 2001 and only 3 or 4 outbound rail shipments in 1999. NS Supplemental Statement at 20.

NJT is to reconstruct and use the Line for light-rail commuter service,¹⁰ and Conrail must seek authority to abandon freight service when NJT is ready to proceed with that project. If abandonment authority is granted, the Line is to be dedicated to passenger service and Conrail's through freight operations are to be transferred to its Northern Branch, which NJT is to reconstruct and upgrade.¹¹ If abandonment authority is denied, Conrail must construct and pay for facilities to permit the Line to be used for joint freight and passenger operations. If joint operations "would not be feasible," Conrail may be obligated to reimburse NJT up to \$6 million for costs that NJT incurs in "avoiding joint use." Paragraph 7(d) of the Agreement.

NJT apparently is ready to begin reconstructing the River Line. As a consequence, Conrail filed the abandonment applications discussed in note 3, supra. Conrail stated that it will continue providing freight service over the Line until the Northern Branch is reconstructed and ready for through service.¹² Conrail explained that the abandonment of the Line would save it the expense of constructing costly safety-related facilities¹³ on an unprofitable line and would eliminate the need for operating restrictions to accommodate joint passenger and freight operations.

As noted, Conrail's abandonment applications were filed under section 308 of the 3-R Act. Section 308(c) requires us (as successor to the Interstate Commerce Commission) to grant, within 90 days of filing, an application to abandon a line that was designated by a timely filed NIR unless an OFA under sections 308(c) and (d) is filed within the 90-day period. In another decision served on March 13, 2001 (separate from the decision that directed CSX and NS to file

¹⁰ NJT is to construct and operate a portion of the Hudson Bergen Light Rail Transit System (HBLRT), described as a key component in the development of public transportation services in densely populated northern New Jersey. The capital projects in the Agreement are intended to increase the transportation options available to commuters, improve the movement of freight over other lines, and aid the environment by reducing air pollution and controlling traffic congestion. NJT Letters filed December 28, 2000, and February 8, 2001.

¹¹ Grade crossings are to be removed and a double track with clearance for double-stack intermodal cars is to be constructed. NJT Letter filed December 28, 2000.

¹² NS and CSXT state that they intend to implement the proposed discontinuance of service exemptions to the same extent and at the same time Conrail exercises its abandonment authorities.

¹³ Conrail estimates that the safety-related facilities needed to accommodate joint passenger and freight use would cost \$1,825,000 to \$1,850,000. NJT estimates that these design and construction costs could range "from \$1.8 million to over \$4 million depending on the joint use design and construction plan." NJT Letter filed December 28, 2000.

supplemental information), we rejected Cognis' argument that section 308 no longer applies to the proposed Conrail abandonments and concluded that Conrail's applications had to be granted unless timely OFAs were filed.

On February 12, 2001, Cognis filed a two-pronged OFA to subsidize the continued operation of the River Line for a 1-year period¹⁴ and to obtain the option to purchase Conrail's interest in the River Line at any time prior to the expiration of the subsidy period. Cognis was found financially responsible in a decision served on February 16, 2001, and the issuance of abandonment authorizations was postponed to allow the OFA process to proceed under 49 U.S.C. 10904 and 49 CFR 1152.27. On April 13, 2001, Cognis filed a petition to set conditions and compensation for the subsidy and purchase of the Line.¹⁵

In a letter filed on January 9, 2002, Cognis states that, because it negotiated a settlement with Conrail on or about December 20, 2001, it no longer opposes the discontinuance of service exemptions at issue here and has withdrawn its Reply. Cognis states that Dykes has also reached a settlement with Conrail. Conrail confirmed, in a letter filed on January 10, 2002, that a settlement was consummated and requested that decisions on the merits of the proceedings be issued expeditiously to permit NJT to meet its construction schedule. A decision was served on January 17, 2002, authorizing Conrail to abandon the River Line.¹⁶ The petitions for discontinuance of service exemptions are now unopposed. We are now granting NS' and CSXT's petitions for exemption to discontinue service over the River Line, subject to employee protective conditions.

¹⁴ Under 49 U.S.C. 10904(f)(4)(B), subsidy arrangements may not remain in effect for more than a year unless agreed to by the parties.

¹⁵ We extended the deadline for requesting Board-established terms and conditions for 30 days, to April 13, 2001, in a separate decision also served on March 13, 2001.

¹⁶ That decision stated that the abandonments could not be consummated until the instant petitions for exemption are granted and service is discontinued.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail carrier may not discontinue operations without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. The proposed exemptions will minimize the need for Federal regulatory control over the rail transportation system and provide expeditious handling of proceedings [49 U.S.C. 10101(2) and (15)]. By minimizing the administrative expense of the application process, the exemptions will also reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. Additionally, the exemptions will foster sound economic conditions and encourage efficient management by eliminating the need for significant expenditures to reconstruct, maintain, and operate a line that has no potential for profitable operation [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy should not be affected adversely. For example, by facilitating NJT's plans to construct and operate a portion of the HBLRT, the exemptions will support light rail passenger service which in turn will promote energy conservation [49 U.S.C. 10101(14)].

Regulation is not necessary to protect shippers from an abuse of market power. Cognis and Dykes are the only shippers located on the River Line. The evidence establishes that Cognis historically has relied on truck service to ship virtually all of the ETOHs used, and virtually all of the finished product produced, at the Hoboken facility and that Dykes has already switched to truck service.¹⁷ As noted, Cognis and Dykes do not oppose the discontinuances.

Because this is a discontinuance of service proceeding and not an abandonment, we need not consider OFAs to acquire the Line for continued rail service, trail use requests, or requests to negotiate for public use. OFAs to subsidize continued rail operations, however, may be filed in discontinuance of service proceedings. Therefore, we will exempt these proceedings from the OFA provisions of 49 U.S.C. 10904. The OFA procedures were fully available in the related Conrail Abandonments. The Federal Register notices that were served and published in those proceedings specifically stated that “[a]ny OFA with respect to the lines should be filed in the pertinent Conrail application proceeding under section 308(d) of the 3-R Act and 49 CFR 1152.27.” Cognis resorted to the OFA procedures in those proceedings but has now withdrawn its OFA and Request to Set Terms. There is no further shipper interest in subsidizing

¹⁷ Finding that regulation is not necessary to protect shippers from an abuse of market power, we need not determine whether the proposed discontinuances of service are limited in scope.

continued rail operations over the Line. As a result, the application of the OFA procedures to these proceedings would be duplicative and unnecessary to carry out the rail transportation policy or protect shippers from the abuse of market power. Additionally, to accommodate NJT's need to begin construction as soon as possible, we will provide for the exemptions in these proceedings to become effective on the date of service of this decision.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve carriers of their statutory obligation to protect employee interests. Accordingly, as a condition to granting these discontinuance of service exemptions, we will impose the employee protective conditions as set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

NS and CSXT submitted supplemental environmental reports and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impact of the proposed discontinuances of service. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental reports, verified their data, and analyzed the probable effect of the proposals on the quality of the human environment. SEA served an environmental assessment (EA) on July 3, 2001, and requested comments by August 6, 2001. No comments were filed.

In the EA, SEA examined the environmental impacts of the proposals. Areas of consideration included, but were not limited to, energy consumption, air and water quality, noise levels, endangered species, and public safety. SEA concluded that, based on the information provided from all sources, the proposals, if implemented, will not significantly affect the quality of the human environment. We agree with SEA's conclusions and adopt them as our own.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt the proposed discontinuances of service, as described above, from the prior approval requirements of 49 U.S.C. 10903 and the OFA procedures of 49 U.S.C. 10904, subject to the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

2. These exemptions will be effective on January 28, 2002. Petitions to reopen must be filed by February 19, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary